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No. 90-947

In The

Supreme Court of the United States

October Term, 1990

ELLING O. EIDE,

Petitioner,

v.

SARASOTA COUNTY, a political subdivision of the State of Florida,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eleventh Circuit correctly determined that Eide's claims were not ripe for adjudication, where it was undisputed that Eide had never submitted even a single plan for commercial development of his properties and where the District Court's "finding" that it would have been futile to have done so ignored undisputed facts and was based upon the District Court's erroneous assumption that Florida's state law is settled as to whether a Sector Plan is subject to the state's unique "consistency" requirement?

2. Whether any of Eide's Section 1983 claims were ripe despite his failure to file any petition for rezoning, merely because the Board of County Commissioners which had adopted a "Sector Plan" designating Eide's properties for "future residential development" would be required to apply the Sector Plan to Eide's properties in the event of a rezoning request, notwithstanding the Board Chairman's testimony that rezoning could be granted regardless of the Sector Plan's provisions?

3. Whether the judgment of the United States Court of Appeals for the Eleventh Circuit should be upheld regardless of whatever decision this Court might reach on the ripeness issue, on the ground that the County had a rational basis for adopting its Sector Plan consisting of its reliance upon the studies and opinions of professional traffic engineers who testified that development of Eide's properties as a commercial shopping area would generate

QUESTIONS PRESENTED – Continued

approximately 18,000 additional trips per day, causing the 36,000 daily trip capacity of a critical link of U.S. Highway 41 to be greatly exceeded, to the immediate detriment of public health, safety, and welfare?

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Sarasota County, a political subdivision of the State of Florida, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's judgment and opinion in this case. That opinion is reported at 908 F.2d 716 (1990).

RESPONDENT'S COUNTER-STATEMENT OF THE CASE

Preliminary Statement

Petitioner Elling O. Eide[1] prematurely filed this action in federal court, attempting to circumvent the local land development approval process. The Court of Appeals for the Eleventh Circuit (the "Court of Appeals") correctly determined that petitioner Elling O. Eide's claims were not ripe for adjudication, since it was undisputed that Eide had not made even one specific proposal for development of his vacant property, had never requested rezoning of his 19-acre parcel, and had voluntarily withdrawn his only petition for rezoning of his 14-acre parcel after he learned that the petition could not be processed without a traffic impact study. R1-13-4 to 5.

The Court of Appeals correctly refused to apply the "futility exception" in this case because the District Court's conclusion that it would be futile for Eide to seek rezoning was not based upon any findings of fact but rather upon an erroneous assumption that Florida's state law was settled as to whether a Sector Plan is subject to the state's unique "consistency" requirement, and upon a

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[1] Eide is not fairly described as a "former professor of Chinese." Petition page 4, Note 2. Rather, he is a land developer and speculator who once, more than fifteen (15) years ago, was employed for one year as a teaching fellow. In 1986, when the present controversy arose, Eide's federal income tax return showed his occupation as "professor," but according to the same tax return, 98% of Eide's income was derived from the sale of real property or from land leases for shopping centers which he owned. (Ex.64; R.4, page 83 – 5.)

simple refusal to recognize the import of the undisputed facts in the case, in view of this Court's prior decisions.

In so holding, the Court of Appeals correctly applied and interpreted this Court's holdings in *Agins v. Tiburon*, 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980); *Hodel v. Virginia Surface Mining and Reclamation Assn.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 87 L.Ed.2d 126, 105 S.Ct. 3108 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986); and *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988). The opinion (App. 13-16) is hereby incorporated by reference.

The District Court's Decision

In its answer to the complaint, in its motion for summary judgment, throughout the course of the trial, and in subsequent proceedings, respondent consistently urged that Eide's claims were not ripe for adjudication since Eide had never submitted even one specific proposal for development of his property and had failed to request rezoning or otherwise secure a final decision regarding the application of the allegedly oppressive Sector Plan to his subject 19-acre and 14-acre parcels. Disregarding this repeated urging of the respondent that Eide's claims were not ripe for adjudication, the district court erroneously allowed the case to proceed to a lengthy and burdensome jury trial. The district court's instructions to the jury were riddled with error.[2] At the

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[2] Among other things, the district court altered the previously distributed special verdict form after final argument,

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conclusion of the jury trial, the trial court, despite its own order that proposed findings be submitted (App.43), failed to adopt any written findings of fact whatsoever.[3]

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over objection, and refused over objection to instruct the jury regarding the proper standard for calculation of damages. The trial judge also refused to instruct the jury that since no invidious discrimination, suspect classifying criteria, or infringement of fundamental interests was claimed, proof of discriminatory intent was required to establish a violation of the Equal Protection Clause under this Court's ruling in *Village of Arlington Heights v. Metropolitan Housing Development Commission*, 429 U.S. 252 (1977).

[3] Subsequent to trial, on August 16, 1988, petitioner filed proposed findings of fact. However, the District Court never adopted these or any other findings of fact. The only thing approaching a finding of fact contained in the record, apart from the jury verdict, is the court's "comment" stated upon the record during a colloquy with counsel, prior to the jury charge conference on April 26, 1988:

> The court finds that although the plaintiff presented no specific plan to the County for development, it is clear that it would have been futile to have done so. Neither a variance nor a special exception could have been of any assistance to the plaintiff in obtaining commercial use of the property because that could not be obtained by way of variance or special exception. The court finds that the only way that the plaintiff could have obtained commercial use of the property was to proceed by way of request for rezoning or to request an amendment to the sector plan, both of which are legislative remedies which the plaintiff was not obliged to pursue prior to seeking judicial intervention. [App. 49-50.]

Clearly, on its face, this "comment" is an erroneous conclusion of law, and not a finding of fact. Other alleged "findings"

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The main "finding" which petitioner herein alleges to have constituted "a finding of fact" was actually a mistaken conclusion of law stated orally upon the record in a confused attempt to justify or explain the trial court's refusal to grant respondent's motion for a directed verdict.[4] (App. 49-50)

The Court of Appeals' Decision

The Court of Appeals properly followed this Court's decisions in *Agins v. Tiburon*, 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980); *Hodel v. Virginia Surface Mining and Reclamation Assn.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); and *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988) and concluded that Eide's claims were not ripe for adjudication.[5]

The Court of Appeals properly relied upon the undisputed fact that, unlike other cases in which courts have sometimes applied a "futility exception" rule in

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of the District Court are nothing more than informal comments and observations made during the course of trial proceedings. [App. 45-50.]

[4] The trial court erroneously concluded that Eide had no duty to pursue rezoning because it was a "legislative remedy." The trial court then incongruously awarded Eide a rezoning to commercial as part of its order granting relief.

[5] *See* also, *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 87 L.Ed.2d 126, 105 S.Ct. 3108 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986).

circumstances where the landowner has made at least one specific development proposal,[6] Eide had failed to make even one specific proposal for the development of his land. The Court of Appeals also properly noted that the Sector Plan itself recommended that the total amount of commercial acreage be increased from 75 acres to 125 acres in the future, when warranted, and thus the potential for future commercial use of Eide's property is not foreclosed.

Thus, the Court of Appeals did not reach respondent's arguments that the jury verdict was illogical, irrational and contrary to the overwhelming weight of the evidence. Nor did the Court of Appeals reach the issues regarding the district court's improper jury instructions, nor did it consider the district court's extraordinary action in altering the special verdict form after final argument had been completed.

The Underlying Dispute

The fundamental issue in this case is whether Sarasota County had a rational basis to adopt a unique form

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[6] *Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1988), *amending* 834 F.2d 1488 (1987), *cert. den.*, ___ U.S. ___, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375 (9th Cir. 1988), *cert. den.*, ___ U.S. ___, 109 S.Ct. 134, 102 L.Ed.2d 106 (1988); *Unity Ventures v. Lake County*, 841 F.2d 770 (7th Cir. 1988), *cert. den.*, ___ U.S. ___, 109 S.Ct. 226, 102 L.Ed.2d 216 (1988); *see, Williamson County v. Hamilton Bank*, 473 U.S. 172, 186-94, 105 S.Ct. 3108, 3116-20, 87 L.Ed.2d 126, ___ (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986).

of local neighborhood land use plan (Sector Plan) providing that within the affected area, future *commercial* development should occur primarily to the *east* of U.S. Highway 41 (where it could be accessible to areas of future population growth via multiple existing and planned future roadways) and providing that land lying to the *west* of U.S. Highway 41 (accessible only by means of traveling on or across U.S. Highway 41) should be primarily limited to future *residential* development.[7]

Petitioner Eide seized upon the County's act of adopting its Sector Plan, which did nothing to change the existing zoning of his properties, as an opportunity which he hoped might allow him to cure his own failure, ten (10) years earlier, to have challenged the rezoning of that portion of his land lying west of U.S. Highway 41 from commercial to residential use.[8]

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[7] Eide concedes that this case does not involve any allegation of a taking. Indeed, Eide's own M.A.I. appraiser recommended that residential development would be the highest and best use of Eide's subject 19-acre and 14-acre parcels. Despite this significant admission by his own appraiser, Eide chose to adduce conflicting testimony from other witnesses who opined that commercial use would be more profitable to Eide than residential use. Eide then sought to attack the County's 1981 comprehensive plan and its recently adopted sector plan as being arbitrary and capricious, since according to these witnesses, the continued designation of his land for "future residential" development limited Eide's potential profits.

[8] Eide owns additional land to the east of U.S. Highway 41 which has been zoned commercial and developed into a K-Mart shopping center, Wendy's Restaurant, grocery store, and bank.

A major difficulty with Eide's position is that the County's Sector Plan was plainly not arbitrary and capricious, but rather reflected a rational and legitimate concern for public health, welfare and safety. The overwhelming weight of the evidence showed that the Sector Plan was based upon a study and 106-page report prepared by the County's professional planning staff which indicated that if the two additional parcels of Eide's land lying west of U.S. 41 were to be developed into a commercial shopping area, the additional traffic generated would exceed by more than 10,000 trips per day the maximum 36,000 daily trip capacity of U.S. Highway 41 at its intersection with Beneva Road, which was already one of the most intensively developed intersections anywhere in the County.

The other difficulty with Eide's position is that the mere adoption of the Sector Plan did not constitute a final decision as to what use of Eide's properties would be allowed. As the Court of Appeals correctly observed,[9] such a final decision can ordinarily be made only after the owner has made a specific proposal for development and has petitioned for rezoning, in the event the specific proposal is not in conformity with the existing zoning. Eide countered that such efforts to obtain a final decision would have been futile because the County had already decided that other properties were more suitable for commercial development and because Florida law requires that rezoning be "consistent" with adopted comprehensive plans and Sector Plans.

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[9] App. 31-32.

However, as the Court of Appeals correctly observed, the Chairman of the Board of County Commissioners indicated that the Board was free to approve a request that Eide's property be rezoned to commercial use if it chose to do so. Florida law is unsettled as to whether a Sector Plan is subject to the state's unique "consistency" requirement. Moreover, as the district court itself observed during trial, it is also an open question whether commercial zoning might be allowed, consistent with the existing comprehensive plan, under an "in-fill" theory; and as the Court of Appeals concluded, it is also uncertain whether the Sector Plan itself will be amended to increase the commercial acreage from 75 acres to 125 acres. For all of these reasons, Eide's claim is not yet ripe. (App. 47-49.)

REASONS FOR NOT GRANTING THE WRIT

I. The Writ should be denied because the Circuit Court of Appeals' Decision is not based upon "appellate fact finding," but rather upon a proper application of this Court's decisions to the undisputed facts and proper analysis of unsettled Florida state law.

The Court of Appeals' decision is not based upon any appellate level findings of fact, but rather rests upon the Circuit Court of Appeals' correct application of this Court's decisions to the *undisputed* facts.

The Court of Appeals disagreed with the district court's conclusion that a decision denying Eide commercial zoning had been finally made and applied to his 19-acre and 14-acre parcels for two reasons, both relating to

issues of law rather than matters of fact. Petitioner's attempt to mischaracterize this disagreement with the district court's reasoning as a refusal to grant due deference to factual findings of the district court will not withstand scrutiny.

As the Court of Appeals' opinion explains, the only facts relied upon by the Court of Appeals were the *uncontested facts* that Eide has never submitted even a single plan for the commercial development of his properties and that he has never submitted a petition to rezone his properties from their present residential zoning to commercial zoning. Thus, the Court of Appeals properly concluded that "the County has not been given an opportunity to apply the Sector Plan to his property." (App. 33.)

The Court of Appeals' opinion carefully considers the district court's "finding" that any such submission of a plan for commercial development of Eide's property or a petition to rezone his property would be "futile" because rezoning must be "consistent" with the Sector Plan. However, the Court of Appeals' discussion of this issue makes clear that the district court's "finding" is really a mistaken conclusion of law, and thus no reason exists for the grant of certiorari:

> We therefore turn to Eide's argument that further proceedings before the County would be futile because the County is constrained by Florida law requiring that all future zoning be consistent with the Sector Plan and that commercial zoning of his property would be inconsistent with that plan. The major flaw in this argument is that Eide's determination of what is inconsistent with the Sector Plan is not controlling here;

> the County and the Florida courts are arbiters of what is consistent. . . .
>
> In this regard there is a split in the Florida state courts over what is meant by the requirement of consistency. [Citations omitted.] (App. 35.)

Thus the Court of Appeals properly recognized that the interpretation of Florida's unique "consistency" requirement is presently unsettled within the Florida state appellate court districts and therefore the potential for future commercial use of Eide's property is not foreclosed. Eide's fear that the County or the state courts will ultimately interpret the requirement adversely to him, however strongly held, does not make his case ripe for certiorari review by this Court.

II. The Writ should be denied because the judgment of the Circuit Court of Appeals can also be supported on alternative grounds, raising a factual dispute not appropriate for exercise of this Court's certiorari jurisdiction.

Grant of the requested writ of certiorari would also be improvident since, in addition to the ripeness question, the case involves a dispute over the facts as to whether the record evidence overwhelmingly demonstrates that the County had a rational basis for adopting its Sector Plan, consisting of reasonable reliance upon the studies and opinions of its professional planning staff, including professional traffic engineers, who conducted a traffic impact study and concluded that development of Eide's properties as a commercial shopping area would generate approximately 18,000 additional trips per day, causing the 36,000 daily trip capacity of U.S. Highway 41

to be exceeded, to the immediate detriment of the public health, safety, and welfare. This issue was vigorously argued before the Court of Appeals, but not reached by the Court of Appeals since it found the ripeness ground dispositive. (App. 14, n.1.)

CONCLUSION

For the reasons discussed above, the petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

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